IN THE HIGH COURT OF JUDICATURE AT JABALPUR (M.P.)

W.P. No 6021/2000 (3)

PETITIONER : M/s. Sun Bright Marketing Pvt. Ltd., through its Managing Director Shri Prakash Chand Sethi, 199, Civil Lines, near Dr. Virdi House, Raipur (M.P.)

V E R S U S

RESPONDENTS :
1. Commissioner (Excise), Gwalior (M.P.)
2. Collector (Excise), Raipur (M.P.)
3. Assistant Commissioner (Excise), Raipur (M.P.)

Amendment as per court order dt. 28-2-2001

4. A. The Secretary Department of Excise and commercial taxes
4. B. Excise Commissioner

WRIT PETITION UNDER ARTICLES 226/227 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF APPROPRIATE WRIT, ORDER, DIRECTION ETC.

AFR.

WRIT PETITION No.6021 of 2000

M/s.Sun Bright Marketing Pvt.Ltd

-v-

The Commissioner (Excise) Gwalior and others

ORDER

Post for 4 -4-2001

Sd/-
R.S. Garg
Judge

3-4-2001

Seen markers
4.4.2001

AFR

HIGH COURT OF CHHATTISGARH : AT BILASPUR.

Writ Petition No.6021 of 2000.

M/s Sun Bright Marketing Pvt. Ltd.,
through its Managing Director,
Shri Prakash Chand Sethi.
... Petitioner.

Vs.

The Commissioner (Excise),
Gwalior (M.P.) & Others
... Respondents.

* * * * * *

O R D E R

By. Hon.Shri R.S.Garg,J.:

By this petition under Article 226/227 of the Constitution of India, the petitioner claims the relief that the records relating to the contract and issuance of the notice to the petitioner, be called; the impugned notice dated 11.10.2000-(Annexure-P/15) be quashed; the petitioner be given credit for 3 days i.e. 1st,2nd and 3rd April,2000, as the licence in question was issued on 3rd April, 2000 itself; the respondents be directed to give credit of 13 days to the petitioner for which the petitioner's shops remained closed on account of undeclared dry days; the petitioner be given 25 days grace period so that he may compensate the losses.

2). The petitioner being a successful bidder was awarded contract of country liquor/foreign

397

liquor for the district Raipur,for the period commencing from 1-4-2000 to 31-3-2001. As per the sale memo and the auction notice, the contract was to commence w.e.f. 1-4-2000, but because of certain administrative problems, the contract/licence could be awarded/granted to the petitioner on 3-4-2000 and the permit was issued to the petitioner on the same day at about 6.00 p.m. According to the petitioner as there was delay of 3 days in award of contract, he was not liable to pay the licence fee for those 3 days,and was entitled to pro-rata deduction for 3 days or in the alternative, was not liable to pay the licence fee for the 3 days. According to the petitioner, on account of the political demonstrations, as the new State of Chhattisgarh was coming into existence, the petitioner was required to close his shops. He was also required to close his shops under the illegal orders of the Collector, when the election process commenced in the contiguous district . The petitioner was required to close his shops between 22.6.2000 to 24.6.2000 as the elections were conducted in Durg Municipal Corporation. He was also required to close his shops between 28.7.2000 to 30.7.2000 under the orders of the District Magistrate,Raipur (Annexure-P/6), as the elections of Bhilai Municipal Corporation were conducted. He was also required to close his shops on 20th,21st and 22nd July,2000 because of the political agitations/demonstrations. He was also required to close his shops on 5-9-2000 as under the political agitation, the political

parties and the public at large were demanding the main seat of High Court of Chhattisgarh at Raipur and a Bandh was declared. Similarly, he was required to close his shops on a political agitation relating to Kargil/Kashmir issue. He also submits that his shops also remained closed on account of Moharram and Independence-day, therefore, he is entitled to compensation for those 2 days also. According to the petitioner, Moharram and Independence-day were declared as dry days, but the other 11 days were not declared as dry days and in view of the political agitations and elections, the petitioner was required to close his shops, therefore, he is entitled to declaration in his favour that he is not libale to pay pro-rata licence fee for 11 days. According to the petitioner, the closure of the shops on particular days do not come under the terms of the sale memo, therefore, he is entitled to compensation.

3). According to the petitioner, he was not given credit for 3 days in the month of April,2000 and on account of closure of shops on 11 days, he had sustained losses. Despite that, the respondent No.2 issued a memorandum dated 31st August,2000 to the petitioner stating that the petitioner did not deposit the auction money for the month of July,2000, therefore, the shops for the remaining period may be put to reauction. The said memorandum/ notice is Annexure-P/8. The petitioner immediately submitted a representation and pointed out to the

authorities that he was entitled to credit for 3 days auction money for the month of April,2000. According to him, he informed the authorities that on account of undeclared dry days, the petitioner was required to close his shops for 13 days,there--fore, he was entitled to credit of the said days. The representation has been annexed to the petition as Annexure-P/9.

4). The respondents after receiving the representation dropped the ~~xxxxxx~~ proposed re-auction. On 23.9.2000, under Annexure-P/10, the Collector, Excise,Raipur issued a notice to the petitioner to show cause as to why the petitioner's ~~li~~licence be not cancelled and the shops be not put to reauction, as the petitioner did not deposit the balance amount for the month of August,2000. The petitioner submitted yet another representation/ reply on 29.9.2000 vide Annexure-P/11. In this representation also, the petitioner requested the authorities for grant of credit for 3 days of April, 2000 and the days for which he was compelled to close his shops. According to the petitioner, his reply to the show-cause notice was not considered and the respondents issued yet another memo dated 30-9-2000. A copy of which has been filed by the petitioner at Annexure-P/12. This memorandum/notice again informed the petitioner that as he did not deposit the amount due for the month of July, the shops would be put to reauction. The petitioner under Annexure-P/13, dated 9.10.2000 submitted

another representation to the authorities stating that his representation seeking credit/compensation for 3 days of April,2000 and the days for which he was required to close his shops was not considered, therefore, until final decision of the representation, the reauction be kept in abeyance. He,however, informed the authorities that he had deposited the substantial amount between 30th Sept., 2000 to 10th October,2000. On 10-10-2000, the petitioner submitted yet another representation against the memorandum dated 30.9.2000. The representation dated 10.10.2000 has been annexed to the petition as Annexure-P/14. On 11.10.2000, the petitioner was served with a notice that in relation to undeclared dry days, the petitioner's objections were not maintainable. The petitioner was also informed that for giving credit of 3 days of April,2000, instructions were sought from the Office of the Commissioner. The petitioner was again informed that if the balance amount was not deposited by 17.10.2000, the licence granted in favour of the petitioner would be cancelled and the shops would be put to reauction on 17th itself. The said memorandum has been annexed with the petition as Annexure-P/15.

5). The petitioner submits that the memorandums issued by the authorities, especially, the memorandum dated 11.10.2000 (Annexure-P/15) is bad, illegal and is contrary to the provisions of law. According to the petitioner, the petitioner could

(401)

not be compelled to close his shops on the days which were not declared as dry days and as he is entitled to the credit of those days or in the alternative, he is entitled to be compensated in terms of daily licence fee and the loss of the profits; the respondents would not be justified in demanding the full amount for whole of the year.

6). The petitioner has submitted that the licence fee for 1st,2nd and 3rd April,2000 could not be recovered nor is recoverable from the petitioner because the contract came into existence on 3-4-2000 and the permit was also issued in favour of the petitioner on the same day. The petitioner submits that the Collector on the ground of administrative exigency and/or in the public interest, may direct closure of the shops for 3 days, but in the present matter, there was no administrative exigency and as according to the sale memo the shops are required to be closed if the elections are being held in the same vicinity, the directions of the Collector,Raipur to close the shops of Raipur district, though the elections were to be held in the adjacent district, the said closure effected under the orders of the Collector is contrary to the terms of the Act, General Conditions and the sale memo, therefore, the petitioner is entitled to be compensated for the period between 28.7.2000 to 30.7.2000 and 22.6.2000 to 24.6.2000. The petitioner submits that on account of the political agitations, the petitioner was required to close

his shops for atleast 5 days, therefore, the petitioner is entitled to be compensated and the respondents are not entitled for these 5 days licence fee.

7). The present petition was filed on 16.10.2000 in Madhya Pradesh. On 17.10.2000, Hon'ble Mr.Justice Deepak Misra,directed issuance of the notice to the otherside on the question of admission/final disposal. Learned counsel for the petitioner submitted that out of the demand amount, the petitioner had deposited the substantial amount and if some time is granted to the petitioner, the balance amount shall be deposited. On 17.10.2000, the High Court directed that if the balance amount is deposited by 29.10.2000, no coercive steps shall be taken against the petitioner. After constitution of the State of Chhattisgarh, the matter was transferred from High Court of Madhya Pradesh to High Court of Chhattisgarh. The matter came-up for hearing on 29.12.2000. On 29.12.2000, this Court directed that the effect and operation of letter dated 23.12.2000, issued by the Department, shall remain stayed till next date of hearing. The matter was directed to be listed on 4th January,2001. On 4-1-2001, the matter again came-up for hearing. Learned counsel for the respondents/State informed that the return was already filed. This Court,therefore, directed that the matter may be listed on 9.2.2001 for further hearing. The matter,thereafter, came-up for hearing on 9.2.2001. It was required

to be adjourned on a request made by the learned counsel for the petitioner. On 24.2.2001, the petition was heard in part and as the learned counsel for the respondents raised an objection that the State of Chhattisgarh was a necessary party and in absence of the State of Chhattisgarh, the petition deserves dismissal. Learned counsel for the petitioner prayed that if some time was given to him, he would join the State as a party. On 28.2.2001, application for joining the party came-up for hearing and the same was allowed. The respondents 4(A) and 4(B) were joined. On 1-3-2001, the learned Dy.Advocate General, appeared for the newly added respondents 4(A) and 4(B) and submitted before the Court that the return filed by the respondents 1 to 3 be treated as return filed for and on behalf of respondents 4(A) and 4(B). After hearing the parties, this Court granted interim direction in favour of the petitioner for exemption from paying the licence fee for six days. After the interim order, the parties were finally heard.

8). During the course of the arguments, Dr.N.K. Shukla, learned Dy.Advocate General, placed his strong reliance upon the judgment of High Court of Madhya Pradesh in the matter of Shatrughanlal Shrivastava and others Vs. State of Madhya Pradesh and others, reported in 1997(2) M.P.L.J.- 54 and in the matter of Ashok Kumar Sahu and another Vs. State of M.P. and others, reported in AIR 1994-M.P.-130.

I found that in view of the differences in the terms of the sale memo of the case of Shatrughanlal (Supra) and the present petitioner, the parties were required to be further heard. The matter was listed on 22.3.2001. Learned counsel for the respondents prayed for time and the parties were, thereafter, heard on 30.3.2001. The respondents submitted their reply to the interim application, but, however, at the time of hearing, submitted before the Court that the said reply be treated as their return.

9). In the reply cum return, the respondents submitted that the State of Chhattisgarh was a necessary party and in absence of the State of Chhattisgarh, the petitioner could not proceed. However, this objection now does not survive in view of joinder of respondents 4(A)and (B). According to the respondents, the petitioner did not raise any objection in the departmental forum and as they have directly approcahed the High Court, the petition deserves to be dismissed. In paragraph 3, they clearly stated that country liquor and foreign liquor shops of district Raipur, were auctioned on 30.3.2000 and as the auction bid was confirmed by the Commissioner,Excise, Gwalior on 3-4-2000; but, as the contract period was commenced w.e.f. 1-4-2000, the petitioner is liable to pay licence fee for the period between 1-4-2000 to 3-4-2000. They also submitted that the petitioner is not entitled to claim any adjustments for all

the shops of Raipur district because on account of elections in Durg and Bhilai, all the shops of Raipur district were not required to be closed. It was further submitted in the return that the orders for closure of the shops were passed by the Collector Raipur, in view of the request of the Collector, Durg and the notification of Madhya Pradesh State Election Commission and the notification of the State Government dated 13.12.99 (Annexure-R/7) and as the General Conditions of the licence says that " Every licence for the retail sale of intoxicants shall be bound to observe both the general and special conditions of the licence and all the directions and orders issued,whether such directions and orders be embodied in the conditions of the licence or not." According to them, the State Government is authorised to amend any condition of licence during the currency of the licence, unless otherwise directed, such amendment shall be effective as from the commencement of the licence and the licensee shallbe bound by the same and shall not be entitled to any damages on account of any such amendment, the petitioner is neither entitled to any remission/compensation, adjustment or credit. They also submit that the contractors are entitled for exemption only when the shops are closed by the order of Collector and as there was no order by the Collector,Raipur, relating to Chhattisgarh movement or for establishment of High Court or Kashmir crisis the petitioner is not entitled to any exemption. It

406

is also submitted in the return that the petitioner did not come to the High Court with clean hands and as the petitioner is not entitled to any relief, the petition deserves dismissal.

10). Shri N.C.Jain,Sr.Counsel, submitted before the Court that for the period between 1.4.2000 to 3.4.2000, as the licence and permit were not in existence, the respondents are not entitled to any licence fee for those 3 days. Learned counsel for the respondents was unable to meet this argument. He, however, submits that though there was delay in confirming the auction bid, but,as the licence period commenced from 1st April,2000, the petitioner is liable to pay the licence fee for the period between 1-4-2000 to 3-4-2000.

11). In the opinion of this Court, if the bid of the petitioner was not accepted upto 3.4.2000, no agreement/contract came into existence upto 3.4.2000 and as the permit was issued to the petitioner for the first time on 3.4.2000 and he could open the shops on 4.4.2000 and commenced his work w.e.f. 4.4.2000, the petitioner certainly would be entitled to seek exemption for the said period of 3 days. The petitioner's submission that he is entitled to remission or compensation or credit, may be termed as loose phrase, but the effect is that he is not liable to pay the licence fee for 1st,2nd and 3rd April,2000. The respondents under the law, General Conditions and the sale memo, so also the contract, are not entitled to recover the licence fee for the said

days. If the petitioner has paid the amount for the said days, he is entitled to refund or if he has not paid the said amount, then, he is not liable to pay the licence fee for those 3 days.

12). Shri Jain, learned counsel for the petitioner, referring to Section 24, General Conditions of the licence, especially condition No.8, framed under Section 62(2) (g)(h) and (j) and the sale memo submits that a fair perusal and appreciation, of the legal provisions and the sale memo, would clearly show that a licensee is liable to close his shops on the dry days so declared at the time of auction and on all such other days which are mentioned in Schedule 4 annexed to the sale memo and if in violation of the Schedule 4 he is required to close his shops, either under the orders of the Collector or because of particular exigencies, then, such a licensee is entitled to exemption and compensation. It is also submitted by him that closure of the shops on account of elections inDurg and Bhilai, does not fall within Clause (5) and note appended to it of Schedule 4, and the petitioner is entitled to 6 days exemption from payment of licence fee. He also submitted that because of the agitations, the petitioner had to close all the shops in Raipur district for 5 days, therefore, he is entitled to exemption/compensation. It is also submitted by him that the petitioner is also entitled to compensation for Moharram and 15th August. According to him, the petitioner was

required to approach the High Court because the respondents were not ready and willing to decide the representations and were extending threats that the contract would be cancelled and the shops would be put to reauction. According to him, in absence of any decision on his representations, the petitioner had no other remedy but to approach the High Court.

13). On the other hand, Dr.N.K.Shukla, learned Dy.Advocate General, placing his strong reliance upon the judgment of the Madhya Pradesh High Court in the matter of Ashok Kumar Sahu Vs. State of M.P., reported in AIR 1994 M.P.-130, submits that Section 24 read with condition 8 of General Conditions, would authorise the Collector to order closure of the shops, because the power of the Collector to direct closure of the shops as provided under Clause (1) of General Conditions No.8 is not exhaustive, but with Clause(2) is exhaustive of the powers of the Collector. Placing reliance upon the judgment of the High Court in the matter of Shatrughanlal Shrivastava and Others Vs. State of Madhya Pradesh and Others, reported in 1997(2) M.P.L.J.-54, it is contended that if the sale memo contains certain conditions, then, the said conditions are binding on the party and as in the present case, the sale memo condition No.18 governs unfore- seen situation, the petitioner is not entitled to any compensation/exemption. Placing further reliance on the judgment in the matter of

State of Madhya Pradesh and Another Vs. Harishchand, reported in 2000(II) M.P.J.R.-489, it is submitted that remission of the licence fee is permissible only in the circumstances covered under the provisions and circumstances mentioned in Section 32 of the Excise Act, 1915 and as Section 32 in its terms does not apply, the petitioner is not entitled to any relief. The question relating to the alternative remedy though was raised in the return, but was not pressed into service at the time of arguments.

14). Shri Jain, learned counsel for the petitioner submitted that the matter of State of Madhya Pradesh Vs. Harishchand (Supra) was decided on the particular facts, but a perusal of the judgment would show that the High Court was of the opinion that the plaintiffs of each of the appeal was entitled to nominal damages. He submits that though the petitioners have claimed remission, but the loose phrase should not come in their way and the full relief deserves to be allowed to the petitioner. Referring to the judgment in the matter of Shatrughanlal Vs. State of Madhya Pradesh(Supra), he submits that the High Court was considering paras 16 and 42 of the sale memo; but as any equivalent para to para 42 of the earlier sale memo is not to be found in the sale memo for the year 2000-2001, the said judgment would have no application.

Referring to the judgment in the matter of Ashok Kumar Sahu and another Vs. State of Madhya Pradesh (Supra), he submits that if the Collector issues an order for closure of the shops, the State could possibly say that the Collector had exercised his powers, but as the Collector did not issue any order and as the order for closure of the shops is for the period when the elections were going on at Bhilai and Durg, the order of the Collector is bad. According to him, the note appended to Clause (5) of Schedule 4 of the sale memo, does not authorise the Collector to direct closure of the shops, if the elections of the local bodies are being held in any other area.

15). I have heard the parties at length and have considered their arguments.

16). Before considering the arguments on the merits, it would be profitable to refer to Section 24, general licence condition No.8 and provisions of the sale-memo. Section 24 of the Act reads as under :-

> "24. Closing of shops for the sake of public peace -
>
> (1) The District Magistrate, by notice in writing to the licensee, may require, that any shops in which any intoxicant is sold shall be closed at such times or for such period as he may think necessary for the preservation of the public peace.

(911)

(2) If a riot or unlawful assembly is apprehended or occurs in the vicinity of any shop, a Magistrate of any class, who is present, may require such shop to be kept closed for such period as he may think necessary;

Provided that, when any such riot or unlawful assembly occurs, a licensee shall, in the absence of Magistrate, close his shop without any order.

(3) When any Magistrate issues an order under sub-section (2), he shall forthwith inform the Collector of his action and his reasons thereof ."

The general condition No.8 reads as under :-

VIII. Shops to be kept open and adequately stocked .-

(1) Shops shall be kept open every day throughout the year unless their temporary or permanent closure has been authorised by the Collector. Such supply of liquor or intoxicating drugs as the Collector may consider sufficient to meet the local requirement shall be maintained. Subject to the provisions of Section 38 of the Act, and to the exceptions specified in rule XIV, sales be made to all comers on payment at the current rate of sale. Shops for the sale of tari may be closed during the rains i.e. from 1st June to the 14th October.

(412)

(2) Shops shall remain closed for the whole day on such days as the Collector may announce at the time of auctions:

(Provided that the Collector, or District Excise officer, or in their absence a Deputy Collector, duly authorised by the Collector, may require foreign liquor licensees holding licenses in Forms F.L.1 and 2 to open the shops on such days for sale of foreign liquor to bona fide foreign visitors).

(2-a) Subject to sub-rule (2), shops having licence in form F.L.1, (F.L.1-A, F.L.1AA), F.L.1-B, F.L.1-C, C.S.2, C.S.2-A, C.S.3, T-1 and restaurant-bar having licence in form F.L.2 shall remain open from 10 A.M. to 10.30th P.M. throughout the year).

(3) Shops shall also remain closed in any area or areas for such period as the State Government may in public interest deem necessary so to do. An antimation to the effect shall be given to the licensee through the Collector of the district well in advance as far as possible):

Provided that, when a shop is closed under this rule, the Collector may, with the previous sanction of the Excise Commissioner, award compensation to the licensee for loss of profits.

Sale memo condition No.18 reads as under:

§18§ मद्य-निषेध नीति तथा प्राकृतिक विपत्तियों के फलस्वरूप दुकान बन्द करना :- राज्य में अथवा किसी पड़ोसी राज्य में मद्य-निषेध की नीति के फलस्वरूप यदि कोई दुकान / दुकानें बंद की जाती है, तो इसके कारण ठेकेदार को शासन द्वारा कोई क्षतिपूर्ति देय नही होगी. इसी प्रकार यदि पड़ोसी राज्य में मद्य-निषेध के कारण अथवा किसी अन्य कारण से भी राज्य की किसी दुकान का पुनर्नीलाम करने का निर्णय लिया जाता है, अथवा वर्ष 2000- 2001 के दौरान यदि शासन कोई दुकान खोलना आवश्यक समझेगा, तो वैसा करने का अधिकार आबकारी आयुक्त को होगा. तथा उस पर किसी ठेकेदार की आपत्ति

413

मान्य नहीं की जायेगी और किसी प्रकार की क्षतिपूर्ति अथवा छूट किसी भी आपत्तिकर्ता को देय नहीं होगी. यदि ठेके के दौरान ठेकेदार को किसी दैवीय विपत्ति या प्राकृतिक प्रकोप अथवा सामाजिक उपद्रवों, आन्दोलनों, कानून व्यवस्था संबंधी समस्याओं के फलस्वरूप किसी प्रकार की क्षति होती है, तो ठेकेदार को किसी तरह की क्षतिपूर्ति की पात्रता नहीं होगी. सभी लायसेंस मध्यप्रदेश आबकारी अधिनियम, 1915 तथा उसके अंतर्गत बनाये गये एवं समय-समय पर संशोधित किये गये नियमों और समय-समय पर राज्य शासन, आबकारी आयुक्त, कलेक्टर द्वारा पारित आदेशों / अनुदेशों के अध्यधीन रहेंगे.

Secedule-4 appended to the Vikray Gyapan (Sale Memo) reads as under:-

परिशिष्ट क्रमांक - 4

(एक) वर्ष 2000-2001 के लिए प्रस्तावित शुष्क दिवसों की सूची :-

अ. क्र.	विवरण	दिवस संख्या
1.	गणतंत्र दिवस	एक दिवस
2.	स्वतंत्रता दिवस	एक दिवस
3.	महात्मा गांधी जयंती	एक दिवस
4.	महात्मा गांधी निर्वाण दिवस	एक दिवस
5.	होली	एक दिवस (जिस दिन रंग खेला जायेगा)
6.	मोहर्रम	एक दिवस

(दो) उपरोक्त शुष्क दिवसों के अतिरिक्त क्षेत्रीय त्यौहार हेतु तीन शुष्क दिवस निम्नानुसार रहेंगे :-

1.	भगोरिया हाट	एक दिवस (धार, झाबुआ तथा इंदौर जिले के लिए)
2.	रंगपंचमी	सूर्योदय से शाम 4.00 बजे तक (केवल भोपाल नगर निगम सीमा में स्थित मदिरा दुकानों के लिए)

(414)

3. पोला एक दिवस (सरगुजा जिले के लिए तथा बस्तर जिले के लिए)

(तीन) राज्य कर्मचारियों को शासन द्वारा निर्धारित वेतन वितरण के दिन अपरान्ह तीन बजे से दुकानें बंद रखी जावेंगी ।

(चार) इसके अतिरिक्त कलेक्टर को प्रशासकीय तथा लोकहित में यह अधिकार होगा कि वे अतिरिक्त 3 दिनों के लिए किसी भी स्थान की कोई एक या इससे अधिक दुकानें अथवा तहसील या जिले की समस्त दुकानें बंद रखने के आदेश प्रसारित कर सकेंगे ,तद्नुसार दुकानें बंद रखी जावेंगी ।

(पांच) लोकसभा तथा विधानसभा के आम /उप-चुनावों के समय मतदान समाप्ति के लिए नियत समय के पूर्व की 48 घण्टे की अवधि, मतगणना दिवस एवं मतगणना दिवस के पूर्व एक दिन दुकानें बंद रहेंगी । जहाँ तक मतदान एवं मतगणना दिवस के बाद के दिवस शुष्क दिवस के रूप में घोषित करने का प्रश्न है, इस संबंध मे स्थानीय परिस्थितियों को दृष्टिगत रखते हुए संबंधित कलेक्टर निर्णय ले सकेंगे , कि मतदान एवं मतगणना दिवस के पश्चानत शुष्क दिवस घोषित करने की आवश्यकता प्रशासनिक दृष्टि से है या नहीं । इसी प्रकार स्थानीय स्वायत्त संस्थाओं के आम/ उप-चुनावों के समय भी दुकानें बन्द रहेंगी ।

टीप : स्थानीय स्वायत्त संस्थाओं में नगर निगम, नगर पालिका, नगर पंचायत, जनपद पंचायत और जिला पंचायत शामिल है । ऐसे समय पर सिर्फ उन्हीं क्षेत्रों की दुकानें बन्द रहेंगी, जहां निर्वाचन हो ।

(छः) उपरोक्त त्यौहार/ अवसरों के अतिरिक्त प्रत्येक कलेक्टर उनके जिले के अन्दर जो औद्योगिक क्षेत्र है उनकी चतुर्सीमा प्रत्येक क्षेत्र की पृथक- पृथक निर्धारित करेंगे तथा केवल उनके द्वारा इस प्रकार निर्धारित कि गई सीमा के अन्दर स्थित दुकानें श्रमिकों के वेतन एवं खर्चों के वितरण

415

के दिन अर्थात दो दिन बन्द रखी जायेगी । कलेक्टर इन दिनों का निर्धारण इस प्रकार करेंगे कि एक ही शहर में समस्त बिलों और औद्योगिक संस्था के लिए वह एक ही हो ।

§सात§ उपरोक्त पद क्रमांक §एक§ से पद क्रमांक §छः§ तक में दिन शुष्क दिवसों आदि का उल्लेख है, उन दिवसों के लिए संबंधित ठेकेदारों को न तो नीलाम राशि में किसी प्रकार की छूट दी जावेगी, एवं न उन्हें किसी भी प्रकार की क्षतिपूर्ति की पात्रता होगी ।

§आठ§ यदि उक्त निर्धारित शुष्क दिवसों के अतिरिक्त किसी अन्य दिवस को कलेक्टर के लिखित आदेश से दुकानें बन्द की जाती है, तो उन दुकानों के बन्द होने की अवधि में ठेकेदार को संबंधित दुकान के लिए निर्धारित नीलाम राशि में अनुपातिक छूट की पात्रता होगी ।

Section 32 to which a reference has been made by the learned counsel for the State reads as under:-

32. Power to withdraw licences.- Whenever the authority which granted any licence under this Act considers that such licence should be withdrawn for any cause other than those specified in Sec.31, it shall remit a sum equal to the amount of the fees payable in respect thereof for fifteen days, and may withdraw the licence either--

(a) on the expiration of fifteen days' notice in writing of its intention so to do, or

(b) forthwith without notice.

(2) If any licence be withdrawn under clause (b) of sub-section (1) the aforesaid, authority shall, in addition to remitting such sum as aforesaid, pay to the licensee such further sum (if any) by way of compensation as the Excise Commissioner may direct.

(3) When a licence is withdrawn under sub-section (1), any fee paid in advance to deposit made by the licensee in respect thereof shall be refunded to him, after deducting the amount (if any) due to the Government.

Section 32 empowers the licensing authority to withdraw the license. Section 32 provides for withdrawal on any causes other than those specified in Section 31 of the Act. According to section 32, whenever the authority which granted any licence under the Excise Act considers that such licence should be withdrawn for any cause other than those specified in section 31, it shall remit a sum equal to the amount of fee payable inrespect thereof for 15 days and may withdraw the licence. Section 32 further provides that if any licence be withdrawn,under clause (b) of sub-section (1) the authority shall in addition to remitting such sum as aforesaid, pay to the licensee such further sum (if any) by way of compensation as the Excise Commissioner may direct. Sub-section (3) of section 32 provides that if the licence is withdrawn, then, any fees paid in advance shall be refunded to the licensee after deducting the amount due to the Government.

(17) In the matter of State of Madhya Pradesh -v- Harishchand (supra) certain licenses were granted in favour of certain contractors for selling country liquor in various areas specified in the licences in Sidhi district. The sale memorandum clearly stipulated that the contractors shall be allowed to keep their shops open for sale from 10 A.M. to 10.30 in the night. Thereafter, it was found that in the statutory conditions of the licences, it was mentioned that the Contractors shall be entitled to keep open their shops between 10 A.M. to 10P.M.

instead of 10.30 P.M. Some of the contractors filed the suits against the State Government claiming damages inter-alia pleading that contrary to the terms of the sale memorandum, they were required to close their shops by 10 P.M. and as they have suffered losses, they be awarded compensation. The suits were contested on almost every possible defence, but the trial Court decreed the suits. Being aggrieved by the said judgment and decrees, the State Government preferred First Appeal Nos.260/96, 270/96 and 101/1996. The High Court observed that present was not a case for grant of remission u/s 32 of the Excise Act because the pre-conditions for application of such section 32 of the Act were not in existence. The High Court further observed that even if there would have been better sales between 10 P.M. and 10.30 P.M.(in the night) it would be difficult for the contractors to prove the same. The High Court, however, observed that in case of breach of the contract, the plaintiffs would be entitled to some nominal damages. The appeals filed by the State Government were partly allowed, but, however, the High Court awarded nominal damages to the plaintiffs of each case. The judgment in the matter of State of M.P. -v- Harishchand (supra) in fact has no application to the facts of the present case. It appears that the judgment has been cited only to say that the petitioner is not entitled to any remission because the remission is governed u/s 32 of the Act. I have already observed that Shri N.C.Jain, Senior Counsel has made a submission before the Court that the word 'remission' has been loosely used by the petitioner, but in fact, the petitioner is entitled to exemption or compensation or declaration in his favour that he is n

418

liable to pay any licence fee for the days for which under illegal orders of the Collector, he was required to close the shops and was forced to observe undeclared dry days. In the matter of Ashok Kumar Sahu (supra), the petitioners were required to close the shops under the directions of the Collector as the Election Commission required the Collector to maintain law and order in the district and directed that the liquor shops should be closed on the date of polling, two days prior to polling, one day after the polling, date of counting, one day prior to counting and one day after the counting. The question raised before the High Court in the said matter was that the power of the Collector to order closure of shops is exhausted with the announcement which he/may choose to make, as contemplated in clause (2) of the general conditions No.8. The High Court observed as under:-

> "The first sentence of clause(1) of sub-rule VIII states that the shops shall be kept open every day throughout the year unless their temporary or permanent closure is authorised by the Collector According to the learned counsel for the petitioner the authorisation of closure by the Collector referred to in clause(1) of sub-rule(VIII) is the authorisation dealt with in clause (2) and Clause (2) is exhaustive of powers of the Collector. In other words, according to the petitioners, once the collector announces at the time of auctions that the shops shall remain closed for a particular number of days, his power to authorise closure is exhausted. Besides the closure for three days in connection with election announced by the Collector, it must be taken that he also announced the closure for six national holidays and possible closure for six more days in administrative exigencies and in public interest. Considering the language of the first sentence in clause (1) of sub-rule VIII, it does not appear that the authori-

sation of closure by the Collector dealt with therein has any reference to the announcement required to be made by the Collector under clause(2) of sub-rule VIII. It cannot be that the rule making authority contemplated that the Collector willbe even at the commencement of the year, able to visualise situations which may arise in the course of the year which may require closure of liquor shops. The power conferred on the collector under clause(1) of sub-rule VIII appears to be a general or plenary power. An aspect of this power is clarified and specified in clause (2). The exercise of power in clause (2) of sub-rule VIII is limited to the stage of conducting the auction. The power is to be exercised by making an announcement. There is nothing in clause (1) of sub-rule VIII to restrict the exercise of power to the Collector only in relation to conducting elections and restricting the exercise of the authority by way of announcement. In these circumstances, we are not able to agree that the power referred to in clause (1) can be exercised only in the manner specified in clause (2) and only at the time of auction. We hold that the power conferred under clause(1) is general or plenary power and cluase(2) takes only an aspect of such power. The power of the Collector to order closure of shops is not exhausted with the announcement which he may choose to make as contemplated in clause (2). It must, therefore, follow that the order of the collector directing closure of shops for more than 3 days announced at the time of elections is sanctioned by clause (1) of sub-rule VIII referred to above."

The High Court observed that the power of the Collector to order closure of shops is not exhausted with the announcement which he may choose to make, as contemplated in clause (2). The High Court also observed that it must therefore follow that the order of the collector directing closure of shops for more than 3 days announced at the time of election is sanctioned by clause (1) of General

Condition No.8. The General Condition No.8/General Licence Condition No.8 which required consideration in the matter of Ashok Kumar Sahu (supra) has, later on, been amended. Clause (3) of Condition No.8 which earlier read that the shops shall be closed if the collector orders while a regiment or detachment of soldiers is passing or encamped in the vicinity has now been changed. The present clause(3) reads that the shops shall also remain closed in any area or areas ~~for such~~ for such period as the State Government, may, in public interest deem necessary so to do. An intimation to the effect shall be given to the licensee through the Collector of the District well in advance as far as possible.

(18) A fair perusal of clause(3) of the condition no.8 of the General Licence Conditions would clearly show that the power which was earlier exercised by the Collector is no more available to him, instead, the State Government can exercise the powers in directing closure of the shops, now what I have found in section 24 and sale memo. According to section 24, the District Magistrate by notice in writing to the licensee may require that any shops in which any intoxicant is sold shall be closed at such times or for such period as he may think necessary for the preservation of public peace. Section 24 further provides that in case of a riot or unlawful assembly in the vicinity of any shop occurs or is apprehended, then a Magistrate of any class present on the spot may require such shop to be kept closed for such period as he may think necessary provided that in absence of the Magistrate the licensee shall be obliged to close a shop without any order. Sub-section(3)of section 24 provides that

421

when any Magistrate issues any order under sub-section (2), he shall forthwith inform the Collector of his action and his reasons thereof. Section 24 came up for consideration before the Division Bench of the High Court of Madhya Pradesh in the matter of Shatrughanlal (supra). In the matter of Shatrughanla the said petitioners had prayed that section 24 of the Act and General Licence Condition No.2(3) be declared as ultravires. In the said matter, the petitioners were informed by the said respondents No.4 & 5 that the State Government, by order dated 08-10-1989 ordere closure of excise shops on 8th, 9th, 10th, 11th and 13th of October 1989 as dry days. The petitioners challenged the action of the State Government before the High Court and submitted that section 24 of the Act be declared as ultravires because it provided no guide-lines as to in what conditions the shops will be closed. The High Court considered the effect and impact of section 24 in para 10 of its judgment, which reads as under:-

> 10. We have heard learned counsel for the parties and perused the record. So far as the validity of section 24 of the Act is concerned, it only enables the District Magistrate to close the shops in order to maintain public peace. It cannot be said that section 24 of the Act suffers from lack of any guidelines. Guideline has been provided and it is 'public peace'. Public peace may be disturbed on account of some riot or some communal tension or any day to day law and order problem. Therefore, there is a proper guideline in section 24 that in the event of public peace likely to be disturbed, the District Magistrate, by notic

xx

in writing to the licensees, may require them to close the shops for such period as he thinks necessary for preservation of public peace. In fact, at the time of issuing the licences, the notification was issued to all the licensees reserving the right of the District Magistrate to close the shops in addition to certain dry day like independence day, Mahatma Gandhi Jayanti, Holi, Moharram, Republic Day. Alongwith that certain more local holidays are also mentioned. In addition to this, in clause (4), power has been conferred on the Collector that for administrative reasons or in public interest, he can also close down the shops for six days in any year. It is also provided that during the electi of Lok Sabha, Vidhan Sabha or Local Bodies, two days prior to the election and on the day of election, liquor shops can be closed. Collector has also been empowered to close the shops on two days in the industrial areas on the day of distribution of salary etc. Therefore, in section 24 proper guideline is provided that in what circumstances, the District Magistrate shall exercise his discretion of ordering closure of the shops. In fact he is also empowered to order for loss, if it occasions to the licensees. So far as the validity of section 24 is concerned, we do not find that this provision suffers from any invalidi of conferring uncanalised and unfettered power on the District Magistrate so as to render it ultra-vires of Article 14 of the Constitution. Hence, there is no merit in the submission of the learne counsel for the petitioners and the same is rejected."

While considering the effect, the High Court observed that the District Magistrate is empowered to order for loss, if it occassions to/the licensees. It appears that either because of a typographical mistake or some printing mistake, the sentence has not been properly quoted. I understand the said statement to be that the District Magistrate is empowered to order for compensation for the

423

loss if it occasions to the licensee. The High Court observed that section 24 provides proper guidelines and does not confer ~~the~~ untrammelled or uncontrolled powers on the District Magistrate. The High Court also found that the order of the Collector speaks that the State Government as well as the Collector directed closure of shops on those particul five days. In the present case, the question is not that the Collector had issued some order or not, The question is whether the petitioner is entitled to exemption from payment of licence fee or compensation because of closure of shops on account of illega orders of the Collector and because of the political agitations.

(19) In the matter of Shatrughanlal on which very strong reliance has been placed by the learned counsel for the State, the High Court referred to paragraphs 16 and 42 of the sale memo. The said conditions of the sale memo for 1992-93 as quoted in the matter of Shatrughanlal (supra) read as under:

§16§ मद्य निषेध की नीति तथा प्राकृतिक विपत्तियों के फलस्वरूप बंद बना :- राज्य में अथवा किसी पड़ोसी राज्य में मद्य निषेध की नीति के फलस्वरूप यदि कोई दुकान बंद की जाती है, तो इसके कारण ठेकेदार को शासन द्वारा कोई क्षतिपूर्ति देय नहीं होगी । इसी प्रकार यदि पड़ोसी राज्य में मद्य निषेध के कारण अथवा किसी अन्य कारण से भी इस राज्य की किसी दुकान का पुनर्नीलाम अथवा वर्ष 1992-93 के दौरान यदि शासन कोई दूकान खोलना आवश्यक समझेगा, तो वैसा करने का अधिकार आबकारी आयुक्त को होगा, तथा उस पर किसी प्रकार की क्षतिपूर्ति अथवा छूट किसी भी आपत्तिकर्त्ता को देय नहीं होगी ।

(424)

यदि ठेके के दौरान सफल ठेकेदार को किसी दैवीय विपत्ति या प्राकृतिक प्रकोप अथवा सामाजिक उपद्रवों, आंदोलनों, कानून व्यवस्था संबंधी समस्याओं के फलस्वरूप किसी प्रकार की क्षति होती है, तो ठेकेदार को किसी तरह की क्षतिपूर्ति की पात्रता नहीं होगी ।

ये सभी लाइसेंस मध्य प्रदेश आबकारी अधिनियम, 1915 तथा उसके अंतर्गत बनाये गये नियम, संशोधन एवं समय समय पर शासन अधिकारी आयुक्त, म0प्र0 कलेक्टर द्वारा पारित आदेशों / अनुदेशों के अध्याधीन रहेंगे ।

§42§ दैवी आपत्ति एवं अन्य कारणों से हुई क्षति :- कोई भी ठेकेदार व्यापार में क्षति, फसल की खराबी अथवा राजनैतिक आंदोलन, बाजारों का स्थानांतरण अथवा दैवी आपत्ति से होने वाली क्षति के कारण शासन से किसी प्रकार की क्षतिपूर्ति पाने का अधिकारी नहीं होगा ।

The High Court also observed that at the time of inviting tenders for grant of licence the sale memo clearly stipulated for closure of shops on account of law and order problem and if any loss occasions, then the licensee will not be entitled to any compensation for that period. The High Court observed that if on account of law and order, the situation warranted, closure of shops, then the licensee shall not be entitled to be compensated. The High Court virtually concentrated on the specific terms contained in clause(16)and clause (42)of the sale memo of the year 1992-1993. In the sale-memo for the year 2000-2001, the State Government in its wisdom has proposed the condition No.18. Though the present condition no.18 is not para-materia with condition no.16 of the sale memo of 1992-1993, but is substantially the same. Condition No.18 says that if the State Government wants to open new shops then the objections of the Contractor shall not be entertained and he shall not be entitled to any compensation

425

or exemption. It further says if during the currency of the contract, the contractor because of loss in business or natural calamity or social disturbance or demonstrations or law and order problem suffers any losses, then, he would not be entitled to any compensation. Earlier condition No.42 has not been incorporated in the sale memo of 2000-2001. I do not know as to what pursuaded the State Government or the Excise Department to delete the earlier condition No.42. The earlier condition No. 42 said that any contractor because of loss in business loss in crops or political agitations, transfer of market or natural causes, if suffers any loss, then, he would not be entitled to any compensation.

(20) Dr.Shukla, learned Dy.A.G. says that present condition no.18 should be understood to contain earlier condition nos.16 and 42, to this Shri Jain has serious objection. He submits that if the State Government and the Excise Department considers different situations under different clauses, then, deletion of one clause should mean that the State Government/Excise Department was of the opinion that the cases falling under the deleted clause would be cases of compensation and the same should be paid to the contractor. Earlier condition no.42 referred to political agitations. In the present case, condition no.18 does not contain the words 'political agitations'. In the present case, condition No.18 as referred to above, refers to natural calamity, social disturbance, demonstrations and law and order situation. Present is not a case where the political agitations have been included in condition no.18. In the opinion of this Court the argument of Shri Jain must prevail over the argument of Dr.Shukla. If the State Government/ Excise Department knowing well that earlier condition no.16 and 42 were taking within their sweep different

exigencies or circumstances, if deleted the earlier condition No.42, then they cannot be permitted to say that earlier condition no.42 though is not incorporated in present condition no.18, must be read in the present condition no.18.

(21) I would be justified in observing that the words 'social disturbance' and 'demonstrations' must be read to mean social disturbance and social demonstrations. These terms may cover a case where for one reason or the other, the Society or Public is opposed to grant of the licence, opening of a shop in a particular area or continuance of a shop at a particular place. The word 'demonstration' (Andolan) used in condition no.18 of the present sale memo cannot mean that it would cover 'political agitation' within its sweep. If on earlier occasion, 'social disturbance'and 'demonstrations' were treated to be different from a 'political agitation' then, it cannot now be argued that the word 'demonstration' (Andolan) would cover or include a 'political agitation' within its sweep. The fact that the petitioner was required to close his shops for five days on account of political agitations relating to constitution of State of Chhattisgarh, establishment of High Court and on Kargil (Kashmir) issue, has not been denied. If because of political agitations, the petitioner was required to close his shops, then, that was neither a case of natural calamity, social disturbance , public demonstration or law and order situation. If the shops are closed for any reason which is not covered under condition No.18 of the sale memo, then, the petitioner is entitled to an exemption from paying the licence fee or he is entitled to be compensated. I hold that for those five

days the petitioner is entitled to compensation/exemption, The petitioner if has not paid the licence fee for those five days, then, he would not be required to pay the licence fee for those 5 days and if has already paid the fee for those five days, then, he shall be entitled to refund of the amount.

(22) So far as the petitioner's claim for dry days of Moharram and independence days are concerned the arguments can straight away be rejected because the said days were declared as dry days in clause (1) of schedule 4 appended to the sale memo for the year 2000-2001. The further question for consideration is whether under clause (5) of sehedule 4 the Collector, Raipur, could direct closure of the shops when the elections were not being held within the district of Raipur. Annexure P-5 is the order dated 21-6-2000. It says that in accordance with the powers conferred upon the collector under section 24, he directs closure of shops in view of elections to be held in district Durg on 24-6-2000. The said elections were for the Municipal Council, Bhilai-III of Charoda Nagar. Annexure P-16 is yet another order passed by the Collector, Excise, Raipur, on 27-7-2000. In annexure P-16, the collector, Raipur, directed that in view of the letter of Collector, Durg and as elections for Bhilai Municipal Corporation of Distt.Durg were to be conducted on 30th July 2000, the shops shall remain closed/ particular shops of Raipur area would remain closed. Para-5 of Schedule 4 provides that for Parliament and Legislative Assembly elections, for two days before the polling, counting day and a day before the counting day, the said shops shall remain closed and taking into consideration the totality of the circumstances, the Collector may direct closure of shops on the date of polling and subsequent to the

date of counting. It further provides that at the time of elections of local self bodies, the shops shall remain closed. However, the note appended to para-5 of schedule 4 says that the words 'local self bodies' include the Municipal Corporation, Municipality, Nagar Panchayat, Gram Panchayat, Janpad Panchayat, and Jilla Panchayat. The note further says that these shops shall remain closed in those areas only where the elections are to be conducted. A prudent reading of para-5 would make it clear that in case of the election of the local self bodies, the shops shall remain closed only in the areas where the elections are to be conducted. Undisputedly, within the Raipur area the elections were not to be held. The elections were being held in Durg district. Annexures P-5 and P-6 passed by the Collector, Raipur, run contrary to the provisions of sale memo and this illegal action of the Collector cannot be saved u/s 24 of the M.P.Excise Act. Even for the sake of ~~the petitioner~~ respondent, I would say that u/s 24(1), the shops can be closed at such times or for such periods, as the Collector thinks necessary for the preservation of the public peace. Annexure P-5 and P-6 though say that powers conferred upon the Collector u/s 24(1) have been exercised, but the said annexures P-5 and P-6 are conspicuously silent about the maintenance or preservation of public peace. In fact, in the very first paragraph of annexures P-5,and P-6, it is clearly mentioned that the shops were closed because of the ensuing elections.

(23) Confronted with this situation, Dr.Shukla, leanned counsel for the State submits that the action of Collector can be saved under para-4 of schedule-4 of the

sale memo. Para-4 of the schedule says that the Collector shall have power to close the shops for 3 days in view of the public interest or administrative exigencies. I have already found that annexures P-5 and P-6 do not say that for maintenance or preservation of public peace, the said orders were passed. The orders Annexures P-5 and P-6 do not say that the said orders were passed in view of some administrative exigency. Post-facto supply of the reasons would not justify an illegal order. If something is to be done in a particular manner as provided by the law, then, the thing is to be done in accordance with provisions of law or not at all. In the present case, annexures P-5 and P-6 cannot be said to be valid or protected either under section 24 of the Excise Act or under para-4 of Schedule-4 of the sale memo of 2000-2001.

(24) Taking into consideration that not all, but some shops were required to be closed under annexures P-5 and P-6, I am of the opinion that the petitioner would not be entitled to six days compensation or exemption, but he shall be entitled to 3 days compensation in all. The petitioner in view of the discussion aforesaid, is held entitled to 3 days exemption from payment of the licence fee or to get back the amount as compensation, if he has already paid the same to the State Government.

(25) In view of the aforesaid discussion, it is held that the petitioner is entitled to 11 days exemption from payment of the licence fee if he has not paid the entire amount or in the alternative he is entitled to refund of 11 days licence fee as compensation, if he has

paid the entire bid amount. Petitioner's claim for further five days is rejected.

The parties shall bear their own costs.

Sd/-
R.S. Garg
Judge

4 -4-2001